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Book Review (reviewing Albert A. Ehrenzweig, Conflict of Laws (1959))

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BOOK REVIEWS

CONFLICT OF LAWS. By Albert A. Ehrenzweig.¹ St. Paul: West Publishing Co. 1959. Pp. xxxiv, 367. \$6.00.

This is part one ("Jurisdiction and Judgments") of a projected comprehensive work on conflict of laws; the plan is to republish the present part with part two ("Choice of Law") as an integrated volume. The author is peculiarly qualified to undertake the preparation of a textual treatment of conflict of laws. Concerning this controversial subject two noncontroversial statements can be made: (1) For better or for worse, continental ideas have from the beginning influenced the development of Anglo-American law; ² (2) the state of the law is such that continuing critical reevaluation is a pressing need. The author is trained in both continental and Anglo-American law and has previously demonstrated his capacity for independence of thought and constructive criticism in the field. In particular he has been an opponent of the over-generalization which is a source of much of the difficulty and has relied upon historical research and extensive case analysis to show that various propositions of the *Restatement* ³ are not in accord with law and reason.⁴ Under the circumstances a text by an author so well qualified is to be welcomed; it is welcomed by this reviewer, although — as might be expected — with certain reservations.

The published part begins with an introduction which, being intended for the volume eventually to be completed, is not confined to jurisdiction and judgments but suggests the author's approach to conflict of laws in general. In addition this part contains three chapters, the first dealing with jurisdictional and other reasons why a court may decline to adjudicate a case, the second with recognition of foreign judgments, and the third with divorce, annulment, and their incidents. Mention should also be made of the bibliography (p. xxix) and the table of cases (p. 299), both of which are valuable aids to research.

The decision to single out jurisdiction and judgments for separate treatment may require explanation. So far as the author is concerned, what is required is an explanation for including these subjects in a work on conflicts at all; for, he states, in civil-law countries such matters are not treated under the rubric of private international law

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² See STORY, CONFLICT OF LAWS (8th ed. 1883); 3 BEALE, CONFLICT OF LAWS 1879-1975 (1935); LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

³ RESTATEMENT, CONFLICT OF LAWS (1934).

⁴ See, e.g., the following articles by Ehrenzweig: *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474 (1956); *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); *American Conflicts Law in Its Historical Perspective: Should the Restatement Be "Continued"?*, 103 U. PA. L. REV. 133 (1954).

but as matters of procedure. (p. 1) No transfer of the subject matter from conflicts to procedure is proposed; yet, as it happens, the separate treatment derives convenience and utility from what is perhaps a trend toward the inclusion of most of the subject matter in procedure courses in American law schools.⁵

Reference to educational considerations raises at the outset a question as to the book's purpose and function. The author intends the book as an aid not only for lawyers and teachers, but for students as well: "[I]f the case method of law teaching as a training tool is to survive the ever-increasing flood of new law, it will have to be combined with information supplied in materials assignable for self-study." (p. xi) Exactly what this means is not clear: perhaps that students will be expected to read the text while class discussion centers around selected cases. Having recently conducted a relatively unsuccessful experiment in the use of a textbook much better suited for use as a course vehicle than this one,⁶ I would not be sanguine about the prospects of such a use of the book. The text is written in a highly economical and often elliptical style; opinions are freely stated without the provision of adequate basis for the formation of an independent judgment. There is extensive reliance on documentation which the student cannot realistically be expected to exploit (especially when the references are to materials in foreign languages). There are few subjects in the law curriculum in which intimate acquaintance with the facts of the cases and the reasoning of the courts is more important than this. Valuable as the book is as a reference work and a source of ideas, I cannot imagine its general use as a course vehicle. As for the practicing lawyer, while he should delight in those portions which demonstrate that courts often work through problems in practical and sensible ways despite artificial concepts, he will not be able to put directly to use much of the attempted contribution by way of unconventional analysis and new terminology. The probability is that the book will find its greatest usefulness and appreciation among scholars here and abroad.

The introduction is too brief and general to provide a statement of position on conflict of laws susceptible of evaluation. The procedure is to consider the theoretical approaches which have been dominant, especially since the time of Story, and to characterize them as "unitarian" or "pluralistic," or as standing for "no-law," "super-law," or the negatives "no super-law" or "against 'no-law.'" (pp. 4, 6, 13, 15) As I understand it, the comity theory which Story at least superficially espoused represents the absence of any law of conflict of laws. Even Story had to compromise with the idea of "super-law" by resorting to the concept of "jurisdiction, both judicial and legislative." (p. 6) After

⁵ At the University of Chicago as early as 1939 the course in civil procedure opened with a study of jurisdiction and place of trial. See 1 JAMES, *CASES AND MATERIALS ON CIVIL PROCEDURE* 1-139 (1939). At least at Chicago and Michigan there are today procedure courses in jurisdiction and judgments. See BLUME & JOINER, *JURISDICTION AND JUDGMENTS* (1952).

⁶ See Currie, Book Review, 26 U. CHI. L. REV. 686 (1959).

Story, of course, Beale, Holmes, and the *Restatement* became the great pillars of "super-law." But Stone, Cook, and Lorenzen effectively attacked the super-law concept. If there is no super-law we are in danger again of having no law at all, and, indeed, there have been defeatist appeals to general justice (p. 13); however, the outlook is good for a new beginning. Ehrenzweig is as definitely against no-law as he is against super-law, but he tells us here little of what the lines of development for a new law of conflict of laws must be. The local-law theory of Cook and Lorenzen has both virtues and limitations. There is a "'wide and unexplored' relation between conflicts law and the interspatial interpretation of domestic and foreign legal rules," (p. 15) but the "interspatial" approach would "lose sight of indispensable general principles" and "dissolve the discipline of the law of conflict of laws in a necessarily unsuccessful attempt at determining interspatial applicability for every rule of municipal and foreign law." (p. 16) For the same reasons Ehrenzweig rejects the suggestion that there must be a much larger number of narrower rules of more specific application. (*Ibid.*) Although "we should abandon the 'unruly horse' of public policy whenever we can," (*ibid.*) generous encouragement is given to an approach identified as one of "isolating and examining conflicting policies." (*Ibid.*) We shall have to wait for the completed volume to know just where Ehrenzweig stands on these theoretical matters and where his hopes lie. On only one phase of the matter is his position quite clear: He is strongly in favor of the separate consideration and treatment of interstate and international conflicts problems (p. 17); and this, particularly in view of the important problems concerning the sources of the law of conflict of laws in interstate and international cases, is undoubtedly a very good idea.

Apart from the broader considerations of basic theory and method, one feature of this introductory discussion seems to raise an issue of immediate importance. In the course of his assault on the *Restatement* and the notion of super-law in general, Ehrenzweig rejects the idea that the Constitution, through the full-faith-and-credit and due-process clauses, imposes significant restraints upon a state's choice of law. (pp. 12, 29-35, 140, 167; cf. p. 34) Of course it would be quite impossible and undesirable for the Supreme Court to devise a comprehensive system of choice-of-law rules to be enforced on the basis of due process and full faith and credit, but so far as I know no responsible person now advocates such a scheme. The rejection is of the quite moderate proposition that a court may violate the Constitution by applying the law of a state which has no such relation to the transaction, the parties, or the action as to make the application of that law reasonable. The rejection is accomplished in part by treating as nonauthoritative, or "distinguishing," the rather numerous cases in which the Court has invoked one or the other of those clauses to control a state's choice of law or refusal to entertain a cause of action based upon the law of another state. (pp. 13, 30-34, 140) It is accomplished in part by quoting out of context Mr. Justice Brandeis' statement in *Kryger v.*

Wilson⁷ — obviously inconsistent with his own opinions for the Court in *Bradford Elec. Light Co. v. Clapper*⁸ and *Home Ins. Co. v. Dick*⁹ — to the effect that a mistaken application of doctrines of conflict of laws raises no constitutional question. (p. 30) I have stated my views on these matters elsewhere, and there is no point in repeating them here.¹⁰ In addition, however, Ehrenzweig bases his rejection of constitutional restraint upon what purports to be a historical interpretation of the full-faith-and-credit clause. That basis requires some comment.

Attention is focused upon the well-known altered passage in Madison's notes of the convention. Mr. Williamson having indicated that he did not understand precisely the meaning of the "full faith" provision then under consideration, Madison recorded the following (the words in italics being crossed out in the original): "Mr. Wilson & Doctr. Johnson supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, *as they may sometimes serve the like purpose as act* for the sake of Acts of insolvency &c — . . ."¹¹ On the basis of this passage, Ehrenzweig states that "it seems that 'public acts' were included where, as insolvency acts, they 'serve the like purpose' as judgments." (p. 33 n.32) On the same basis he states hopefully that "the constitutional phrase 'full faith and credit to public acts' will perhaps, in substance at least, again be limited to those 'acts of legislatures which serve the like purpose as judgments.'" (p. 34) Thus the constitutional meaning is represented in a paraphrase (p. 34 n.38) of a deleted portion of Madison's notes, reporting the interpretation placed by two other members of the convention on the first draft of what was to become the full-faith-and-credit clause. Such an interpretation ignores later changes in the language of the provision as well as in the constitutional scheme generally — notably the ultimate reference to "*public acts*"¹² and the immediate decision to recommend the clause empowering Congress to establish uniform laws on the subject of bankruptcies.¹³ The interpretation further ignores the opposition of Johnson and Randolph to the language later inserted by the committee, giving Congress the power to "prescribe the effect" of legislative acts of one state in another;¹⁴ that opposition plainly indicates that the requirement of full faith and credit to public acts was

⁷ 242 U.S. 171 (1916).

⁸ 286 U.S. 145 (1932).

⁹ 281 U.S. 397 (1930).

¹⁰ See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958) (both published after the publication of the volume under review).

¹¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447 (Farrand ed. 1911).

¹² Later (p. 167) Ehrenzweig inconsistently recognizes that the probable purpose of adding the word "public" was to *exclude* such private legislation as acts of insolvency.

¹³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *op. cit. supra* note 11; 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 543 (1953).

¹⁴ 2 MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 650 (Scott Special ed. 1898).

broadly significant, and not confined to acts which might "serve the like purpose as judgments."

For his interpretation Ehrenzweig apparently relies heavily upon Professor Nadelmann's valuable historical study.¹⁵ But Nadelmann did not espouse any such narrow interpretation as that given by Ehrenzweig to the requirement of full faith and credit to public acts.¹⁶ He came to the same conclusion that was independently reached by this reviewer¹⁷ and that which is expressed in the *Restatement*.¹⁸ In Nadelmann's terminology, the conclusion is as follows:

The language of the Full Faith and Credit clause is . . . broad enough, however, to support the view that non-application by the forum of a statute of a sister state, applicable under the law of that state, which does not conflict with the law of the forum, is a violation of the full faith command for public acts. . . . The command applies, without implementing law, if the interest of the forum is not adversely affected. . . . For cases of a real conflict the command does not apply.¹⁹

The reformer has his problems of organization and terminology, and Ehrenzweig's handling of some of these will create resistance to his presentation.²⁰ His major thesis is that American concepts of juris-

¹⁵ Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957). See EHRENZWEIG, *CONFLICT OF LAWS* 29 n.5, 33 n.32, 34 n.38, 167 n.4 (1959). Unfortunately, I was unaware of Professor Nadelmann's then recent article when Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958), was written. A distinctive contribution of Professor Nadelmann's article as compared with earlier historical studies, e.g., Ross, "Full Faith and Credit" in a *Federal System*, 20 MINN. L. REV. 140 (1936), is the demonstration that the phrase "full faith and credit" or its equivalent was a "term of art" in the common-law courts. See Nadelmann, *supra* at 44; cf. Currie, *supra* at 18.

¹⁶ "But 'public acts' in the clause is not restricted to this today very rare type of acts of legislatures." (I.e., those "which serve the like purpose as judgments.") Nadelmann, *supra* note 15, at 72. The restricted reading, it should be noted, would render trivial the important though unexercised power of Congress to "prescribe . . . the Effect" of public acts.

¹⁷ See Currie, *supra* note 15, *passim*.

¹⁸ RESTATEMENT (SECOND), *CONFLICT OF LAWS*, Introductory Note at 20 (Tent. Draft No. 3, 1956); see EHRENZWEIG, *CONFLICT OF LAWS* 12 n.27 (1959). Of course, the authors of the *Restatement* may have a different concept of what constitutes "jurisdiction" or a reasonable basis for the application of a state's law. Cf. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952).

¹⁹ Nadelmann, *supra* note 15, at 79-80. See also *id.* at 72, 78-79. Both Nadelmann (*id.* at 75) and Ehrenzweig (p. 33 n.34 (*semble*)) adhere to the view that the command does not extend to nonstatutory law. On this point, see Currie, *supra* note 15, at 15-16.

Another instance of inaccurate treatment of source material may be mentioned. At page 205 n.18 Ehrenzweig cites, as an aberration from the principle that the defendant is free to attack a foreign judgment collaterally on the ground that the foreign court lacked jurisdiction of his person, *Perkins v. Hattiesburg Brick Work*, 212 Ga. 804, 96 S.E.2d 361 (1957) "(no power to pass on constitutionality of sister state service statute)." That any state would impose on its courts so extraordinary a disability is a proposition to arouse skepticism, and, on inquiry, it turns out that the Georgia Supreme Court held only that its *appellate* jurisdiction, as distinguished from that of the Court of Appeals, extended only to cases involving the constitutionality of laws of Georgia or of the United States and not laws of another state.

²⁰ E.g., the concept of "local" as distinguished from interstate and international jurisdiction; "active" and "passive" capacity and their treatment as matters of

diction should be, and are being, assimilated to the civil-law concept of competency, which approximates the idea of the convenient forum: "A civil law court, in principle, is 'competent' only if it is the court of the defendant's domicile or if it has at least a substantial contact with the case." (p. 1) Looming large in the discussion is a renewal of the author's earlier attack²¹ on the "transient rule of personal jurisdiction." It is broadly true that, at least in connection with the modern expansion, our jurisdictional tests have tended to become identified with the considerations associated with the doctrine of forum non conveniens.²² One may readily agree (eschewing the indiscriminating term "contacts" (pp. 1, 79)) that increasingly the test of jurisdiction is coming to be whether the state has a legitimate interest in providing a forum and whether the defendant has not only adequate notice but a realistic opportunity to defend without undue hardship. On the other hand, it is true that the power concepts which in the past have unduly narrowed the scope of jurisdiction have at the same time given it undue breadth, as where the defendant is personally served in an inconvenient forum. The same is true of jurisdiction in garnishment and attachment, though Ehrenzweig gives less attention to the problems of fairness in such situations. The proposal, however, that the doctrine of forum non conveniens, along with other reasons for withholding the exercise of jurisdiction, should be elevated to jurisdictional status is open to serious question. The prospect of opening large numbers of judgments to collateral attack on new grounds is not an attractive one. Arguably we ought to be moving in the opposite direction, toward requiring the defendant to make his jurisdictional objection in the court in which the action is filed, when he has actual notice.²³ Perhaps this is what Ehrenzweig has in mind; at least, he speaks of competency as comparable to venue, noting that defects in competency can be cured by "failure to attack." (p. 74 n.12)²⁴ On the other hand, he speaks with apparent approval of inroads on the transient rule of jurisdiction by "what are fast becoming jurisdictional rules of discretionary . . . and mandatory . . . dismissal" (p. 103); and he sides against the *Restatement* in taking the view that a judgment against one whose presence in the state was compassed by fraud or force is subject to collateral attack. (p. 109)

The serious problem here has to do with the comparative method in general. No doubt that method has much to contribute to the im-

jurisdiction. In some instances Ehrenzweig's innovations are definitely not constructive. *E.g.*, his plea for a return to "jurisdiction of the subject matter" on the sole ground that the preferable term "competency," employed in *RESTATEMENT, JUDGMENTS* § 7 (1942), may be confused with the civil-law concept; his loose, or at least unconventional, employment of the concepts "in rem," and "in personam." (Note especially p. 81: "[I]n personam judgments may now be effective as against strangers not even privy to the parties . . ."—with a reference to a distant discussion of divorce decrees.)

²¹ See note 4 *supra*.

²² See *Kilpatrick v. Texas & Pac. Ry.*, 166 F.2d 788, 790-91 (2d Cir. 1948), cited by Ehrenzweig at 117 n.62.

²³ *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931), was a step in this direction.

²⁴ This note contains the most extensive exposition of the competency concept.

provement of American law, and the typical apathy or hostility toward proposals based on comparative analysis is deplorable. Those attitudes are traceable, I believe, less to provincialism and willful ignorance than to the method of presentation, of which Ehrenzweig's advocacy of the competency concept is an unfortunate example. Too little is revealed of the civil-law practice to enable us to form anything like an intelligent opinion as to how it would serve in the context of our institutions; too little is revealed of continental experience with the problems which we know must arise; and far too little attention is given to the collateral effects of engrafting the unfamiliar concept upon our own procedures. One would not, I hope, undertake to explain the American understanding of jurisdiction to continental jurists in a footnote; the comparativist, however, often pays American readers the undeserved compliment of assuming an acquaintance with foreign legal institutions and a facility in the use of foreign languages. Even if what Ehrenzweig has in mind is that we should move in the direction of requiring the defendant with actual notice to raise his objections to jurisdiction in the court in which the action is filed (a suggestion with which I am in sympathy), it is clear that such a proposal entails serious problems of its own—for example, those relating to proof of notice and to the appealability of interlocutory orders—which must be thoroughly analyzed before the argument in its favor can carry conviction.

Passing over a number of matters, not all of minor importance, on which one would hesitate to endorse the Ehrenzweig position, I conclude with reference to two which involve the same basic problem of the comparative method.

The author's discussion of the doctrine of collateral estoppel in its effect on persons neither parties nor privies happens to be concerned with refuting an analysis suggested by this reviewer. (pp. 225-28) This is not an appropriate occasion for pursuing at length the difference of opinion;²⁵ it is the method of refutation that is of interest here. There are in fact two arguments. The first is stated thus: "A full analysis of the case law would probably demonstrate that courts, without a guide

²⁵ I cannot refrain, however, from pointing out briefly that the author's analysis is faulty. After stating that the judgment may not be pleaded against one not a party nor in privity (though without mention of the elementary considerations of due process which render that proposition clear and noncontroversial), and after stating Justice Traynor's position that there is no compelling reason why the person asserting the plea must have been a party, Ehrenzweig says: "This distinction between the defensive and offensive use of the plea has been frequently applied." (p. 226) But this is not the offensive-defensive distinction which has figured in the analysis of the problem. The plea, if it could be used at all against one not a party, might be used against him either offensively (as a ground of action) or defensively (as a defense). But use of the plea against one not a party is no part of the real problem. The offensive-defensive distinction, as well as the suggested significance of the strategic position in the original action of the party against whom the plea is asserted, has been employed in an attempt to deal with the situation in which the only problem is presented by the fact that the party asserting the plea (offensively or defensively) was not a party to the prior action. This confusion, or at least ambiguity, casts considerable doubt on such conclusions as that in the indemnitor-indemnitee cases that "mutuality is dispensed with without regard to the offensive or defensive use of the plea" (p. 227)

in precedent or doctrine, have found collateral estoppel where, and only where, the causes of action were sufficiently similar so as to justify the conclusion that the party allegedly estopped could have been reasonably expected to litigate the issue in the first suit with the same vigor as in the second suit." (p. 225) This is the kind of intuition which sparks constructive legal research; such an analysis of the case law would be welcome indeed. The second argument is that we should emulate the continental practice, in which there is no such thing as collateral estoppel unless an "incidental declaratory decree" (p. 224) is obtained in the first action and which in any event never recognizes preclusion as to "mere" issues of fact, but only as to relations between parties. (pp. 224, 227) There is an inconclusive attempt to show that confining the effect to relationships would produce better results than have been produced or suggested in the American problem cases; beyond this, the reader is expected to take a great deal on faith. Certainly the concept of "a legal relation between the parties" is not more precise than the concepts employed in American law; no reason is suggested why a judgment "establishing" (p. 227) such a relation should be treated as having different *res judicata* effects than one resolving any other issue of fact — unless, as I suspect, the idea is that there are epistemological differences between the things adjudicated.²⁶

Finally, in connection with his generally enlightened discussion of jurisdiction in matters of family law the author repeatedly advocates, as an alternative to our jurisdictional techniques, a civil-law device known as the "extra-litigious" or "noncontentious" proceeding.²⁷ There may be much of value in this type of proceeding; but we are told little of it, except that the court acts as *parens patriae* and, for example in matters of custody, gives controlling force to such considerations as the welfare of the child. (p. 202)²⁸ In the absence of much fuller information, the reaction of American lawyers is likely to be — and the reaction of one American lawyer is — that a paternalistic official concern for the welfare of the child, laudable though it may be, must be restrained by the safeguards of due process, and that we may well muddle through in our own way until we are assured that the proposed innovation will not neglect those safeguards.²⁹

I shall forebear the conventional close in which the reviewer, on behalf of the profession, looks forward with anticipation to the appearance of the completed work. It is my belief that the state of affairs in conflict of laws is such that a comprehensive text is as premature as is a

²⁶ Cf. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 314-15, 315 n.70 (1957).

²⁷ PP. 1 n.2, 21, 88 n.82, 175, 202, 268, 272, 275, 280-81 n.48, 293.

²⁸ For further information we are referred to works in French and German. P. 1 n.2.

²⁹ Cf. *Williams v. Williams*, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955) (use in custody case of confidential reports by welfare agency denies due process). Ehrenzweig's concern for the welfare of the child may account for his apparent dislike of *May v. Anderson*, 345 U.S. 528 (1953) (p. 292), although the Court there held no more than that a court without personal jurisdiction of the mother could not conclusively award custody to the father.

restatement, and there is little reason to assume that an individual effort will be more satisfactory than a group effort. The task is an enormous one, and talents such as Ehrenzweig possesses should not be dissipated in an attack on too broad a front. Provocative and stimulating though a complete statement of his ideas would undoubtedly be, his energies would be more usefully directed toward intensive case studies of the sort he has suggested (p. 225) and to the effective presentation of ideas for improvement based upon comparative analysis.

BRAINERD CURRIE *

LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES. By James Willard Hurst.¹ Madison: The University of Wisconsin Press. 1956. Pp. ix, 139. \$2.50.

The book here reviewed is now three years old, but no apology is necessary for reviewing it despite its publication date. Apology, if any, should be made by most of the legal publications in this country for ignoring the book, which in 1958 was awarded the Ames Prize by the faculty of the Harvard Law School "for a meritorious essay [or a book] on some legal subject." The volume reproduces three lectures in which Professor Hurst examined the role of law in the history of the nineteenth-century United States. The lecture-essays are entitled "The Release of Energy"; "The Control of Environment"; and "The Balance of Power."

Professor Hurst analyzes critically some of the more prevalent clichés used to describe nineteenth-century attitudes, for example, *laissez faire* and the protection of vested rights, and while he advances no radically new theories, he adds some new understanding to the old concepts. The basic theory is stated early: "Not the jealous limitation of the power of the state, but the release of individual creative energy was the dominant value." (p. 7) The vested-rights doctrine is seen not as the protection of the acquired property of a *rentier* class, but rather more dynamically as the protection of market ventures, the to-be-acquired capital. In all of this, Professor Hurst examines and describes the role of law — public and private, judicial, legislative, and executive — in enlarging "the options open to private individuals and groups" (p. 39) and, at the end of the century, in slowly attempting to re-create a balance of power in a society in which the sources of authority would be widely diversified.²

This brief resumé is much too simple and can only hint at the magnitude of the task that Professor Hurst has undertaken. For this task he combines the talents of a legal scholar of the first rank with the wide knowledge of a thoughtful student of United States history, economics, and thought. But one who expects to find in this volume the completed

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² If this synopsis has a slightly familiar ring, it may be because one catches glimpses throughout the lectures of the shades of Frederick Jackson Turner.